

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

IN RE: . Case No. 10-93904-BHL-11  
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EASTERN LIVESTOCK CO., LLC, . 110 U.S. Courthouse  
. 121 West Spring Street  
. New Albany, IN 47150  
. .  
Debtor. . January 13, 2012  
. . 10:12 a.m.  
. . . . .

TRANSCRIPT OF MOTION TO APPROVE AN INFORMAL AD HOC COMMITTEE  
AND APPLICATION TO EMPLOY PHILLIP L. KUNKEL AS MEDIATOR  
BEFORE HONORABLE BASIL H. LORCH, III  
UNITED STATES BANKRUPTCY COURT JUDGE

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Proceedings recorded by electronic sound recording, transcript  
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1 (Difficult to discern telephone participants)

2 THE COURT: All right. We're on the record in  
3 Eastern Livestock. I have a list of the appearances by phone.  
4 Would the attorneys in the courtroom state the appearances,  
5 please?

6 MR. OYLER: Mike Oyler, Your Community Bank.

7 MR. BRAND: Steve Brand, Superior Livestock.

8 THE COURT: We have a proposed agenda that we're  
9 working from. I would ask all attorneys who are appearing by  
10 phone to -- and in the courtroom -- to state your name before  
11 you speak so that we can have a clear record. And, as always,  
12 if you put us on hold -- don't put us on hold especially if  
13 your phone plays music. And it's helpful if you keep your  
14 phone on mute until you speak.

15 Who wants to take me through the agenda?

16 MS. HALL: This is Terry Hall, Your Honor, for the  
17 trustee and short of (indiscernible) I'm happy to start today.

18 THE COURT: All right.

19 MS. HALL: We would move down to Item Roman Numeral  
20 II the matter of the employment application filed by the  
21 trustee to employ Phillip L. Kunkel as a mediator in these  
22 proceedings, and Mr. Kunkel is on the line. The application  
23 was filed on January 3rd. No objections have been received --  
24 have been filed or received by the trustee, and we'd ask that  
25 the application be approved.

1 THE COURT: Anyone else want to be heard on that  
2 matter?

3 (No audible response)

4 THE COURT: I'll show that that application is  
5 approved.

6 MS. HALL: The next item, Your Honor, is an adversary  
7 proceeding which is the Superior Livestock Auction versus  
8 Eastern Livestock. At this point there was simply I think a  
9 suggestion at the last hearing that the parties may want to  
10 address a briefing and argument schedule on Fifth Third's  
11 motion. I believe Mr. LaTour is on the line.

12 MR. LATOUR: Yes, Your Honor, this is Randall LaTour.  
13 I am on the line.

14 THE COURT: All right.

15 MS. HALL: And I believe (indiscernible) is on the  
16 line and I believe somebody for Superior is in the courtroom.

17 MR. ROGERS: Also, John Rogers is on the line for  
18 Superior.

19 THE COURT: All right. And so -- well I thought the  
20 briefing schedule was already -- oh, no, is that the one we  
21 held? Yes, we delayed the briefing schedule pending the  
22 briefing in the other matters, didn't we?

23 MR. LATOUR: Your Honor, this is Randall LaTour from  
24 Fifth Third. What your order actually says is that you grant  
25 the order -- or grant the motion of Superior. Accordingly all

1 deadlines for briefing and arguments are tolled until further  
2 order of the Court. The parties may address the briefing  
3 argument schedule related to Fifth Third's motion at the  
4 omnibus hearing on January 13. So, you have it on hold and  
5 apparently invited comment today if somebody was so moved.

6 THE COURT: Are you so moved?

7 MR. LATOUR: I'm at the pleasure of the Court, Your  
8 Honor.

9 THE COURT: Well, you know, we're still -- I mean, I  
10 don't know that I really care. I'm not going to get to it  
11 right away even if you start briefing it because I'm still in  
12 the middle of the other matters that have been briefed.

13 MR. LATOUR: Well, Your Honor, I've already briefed  
14 mine and the other one is simply on -- you know, the response  
15 is on hold.

16 THE COURT: Right.

17 MR. ROGERS: Your Honor, this is John Rogers. I  
18 actually filed the motion on behalf of Superior. And of course  
19 the main reason for doing it was the matters that have already  
20 been briefed that are before the Court pretty much simplify or  
21 perhaps moot the issues related to this motion (indiscernible)  
22 So, the other pending motion and the fact that it doesn't  
23 really make sense.

24 THE COURT: All right. I think what I'll do is, I'll  
25 leave it as it is until the February 13th omnibus and I hope to

1 have some orders out before then which will maybe clarify  
2 things or certainly advance matters to a certain degree.

3 MR. ROGERS: Thank you, Your Honor.

4 THE COURT: So, we'll leave that as it is until the  
5 next omnibus which is on February 13th at 10 a.m.

6 All right. Moving on.

7 MS. HALL: The last item, Your Honor, is a related  
8 case of Thomas and Patsy Gibson and it's a motion by Peoples  
9 Bank & Trust with various objections by the trustee. Mr. Raluy  
10 is on the phone representing Peoples Bank & Trust. And Mr.  
11 Toner is here on the phone with me. Our understanding is that  
12 the parties have reached an agreement and will file an agreed  
13 entry on this matter.

14 MR. RALUY: Yes and no. And this is Anthony Raluy,  
15 Your Honor, and basically the trustee in the Gibson case and  
16 ourselves and the other objector which is Fifth Third Bank all  
17 have reached agreement on an agreed order.

18 There is one party missing and that's Mr. Gibson and  
19 his bankruptcy counsel has informed us that they don't have an  
20 objection to it, but he can't get authorization -- he can't get  
21 a hold of this client to get authorization to sign the  
22 agreement.

23 MS. CARUSO: Excuse me. Debbie Caruso. We're in the  
24 adversary proceeding that's pending in the Gibson case. Mr.  
25 Gibson is being deposed next week. Perhaps you could show up

1 and make a record that he has no objection to the agreed entry.

2 MR. RALUY: I suppose we can do that.

3 THE COURT: All right. Well, then why don't you just  
4 let us know after that takes place, if in fact that is what  
5 took place.

6 MR. RALUY: Okay.

7 MR. TONER: This is Kevin Toner, Your Honor.

8 Assuming the status moves over, this will eliminate the need  
9 for that February 1st trial.

10 THE COURT: Okay. Right. That's what I was  
11 assuming, but I'm glad you made that clear.

12 MR. TONER: Yes, Your Honor. If you have a minute I  
13 was going to inform the Court that we have settled the stay  
14 relief and the trial on February 1st in the Eastern case, as  
15 well.

16 THE COURT: Okay. Very good. That was the one with  
17 the bank from Kentucky, is that right?

18 MR. TONER: Tennessee, Your Honor.

19 THE COURT: Oh, Tennessee. One of those southern  
20 states.

21 MR. TONER: Yes.

22 THE COURT: All right. Okay.

23 MR. RALUY: Your Honor, Mr. Toner and I are going to  
24 be filing a motion to approve the settlement. But, the terms  
25 that we've reached basically involve the 363 sale of the



1 property, the estate will receive 20 percent of the net sale  
2 proceeds and the bank will receive 80 percent of the proceeds.

3 THE COURT: All right.

4 CALL OPERATOR: Joining the meeting.

5 MS. BRYANT: Lisa Bryant here.

6 THE COURT: I think that was -- I think we just  
7 talked about Ms. Bryant's -- isn't she Peoples Bank?

8 MR. RALUY: Yes, Your Honor.

9 MS. BRYANT: Good morning, Your Honor. I'm sorry I  
10 -- Mr. (indiscernible) probably told you I had a doctor's  
11 appointment.

12 THE COURT: Well, I was just being told that that  
13 matter is settled. There is a detail of getting Mr. Gibson's  
14 consent that's still hanging, and they're going to ask him  
15 about that at the deposition next week.

16 MS. BRYANT: I'm sorry. What was that, Your Honor?

17 THE COURT: The parties were just reporting that the  
18 matter is settled, but they have not been able to get explicit  
19 authority from Mr. Gibson to sign off, but that at his  
20 deposition next week they're going to ask him if he consents to  
21 the settlement.

22 MS. BRYANT: Is this on the agreed entry on stay from  
23 relief on abandonment?

24 THE COURT: Yes.

25 MR. TONER: Yes.

1 MS. BRYANT: Fred -- is Fred Simon appearing today?

2 THE COURT: No.

3 MS. BRYANT: Your Honor, I did get an e-mail from  
4 Fred last night stating that even though he hasn't been able to  
5 get in touch with the Gibsons, he was not aware of any  
6 objections that they could raise. So, he told me I was  
7 authorized to tell you that and if you wanted to go ahead and  
8 approve the agreed entry without Fred's signature, Debbie  
9 Caruso has authorized me to sign, Ted King has authorized me to  
10 sign.

11 So, Fred said he would -- you know, he had no  
12 objection to you entering the -- approving the agreed entry  
13 without his signature if the Court is okay with that.

14 MR. LATOUR: Your Honor, this is Randall LaTour from  
15 Fifth Third. We may be talking about two separate motions,  
16 both involving Peoples Bank. There is an adversary proceeding  
17 in the Eastern case involving Peoples Bank.

18 THE COURT: Right.

19 MR. LATOUR: There's a separate motion for relief  
20 from stay on abandonment in the Gibson case regarding different  
21 property. There is an agreed order in each of those instances.

22 THE COURT: Right. No, I'm aware of that. At this  
23 particular moment I was addressing the Gibson case because as I  
24 understood it that's the one that a moment ago, Ms. Caruso, you  
25 indicated that you were going to try to get Mr. Gibson's

1 consent on the record at his deposition, is that correct?

2 MS. CARUSO: Yeah, I would be happy to ask. Although  
3 the deposition that has been noted in the adversary pending in  
4 the Gibson case relateding to other properties, I would be  
5 happy to question Mr. Gibson with respect to his consent to the  
6 agreed entry we're discussing right now.

7 THE COURT: All right. Well, I mean, let -- from the  
8 Court's standpoint, if the parties are satisfied with the  
9 agreed entry I'll approve it. The -- you know, I don't know  
10 that -- I mean I think Mr. Gibson -- the trustee can sign on  
11 behalf of Mr. Gibson, can't they?

12 MS. CARUSO: I think you're right on that, Your  
13 Honor. And in light of Ms. Bryant's appearance and  
14 presentation to the Court regarding her discussions with Mr.  
15 Simon, I do think that it would be appropriate.

16 THE COURT: All right. Well get me the entry and an  
17 order approving and I'll sign an order approving.

18 MS. BRYANT: All right. Thank you all very much.

19 THE COURT: All right.

20 MS. CARUSO: Late, but very helpful.

21 THE COURT: Okay. In Eastern a couple things that  
22 are not on the agenda and maybe you can status me on these  
23 matters. What about this Rush Creek Ranch adversary?

24 MR. NEWBERN: Your Honor, this is Scott Newbern.

25 THE COURT: Yes?

1 MR. NEWBERN: I represent one of the defendants in  
2 that matter. It is being consolidated with another matter that  
3 is before the Court involving a payment into the court,  
4 directly into the -- under the fund by a Lynn Miller.

5 Along with several other matters, I'm drafting the  
6 motion today and I will hopefully get counsel's approval and  
7 we'll file a stipulated motion for the consolidation. That's  
8 what we talked about, and the holidays interfered with getting  
9 it done.

10 THE COURT: Okay. That's fine. I'll be looking for  
11 that. Then also in Eastern we had an objection, a supplemental  
12 objection to the purchase money claims report filed by  
13 Hillard-McKettrick, et cetera.

14 MR. NEWBERN: That's me, Your Honor, again Scott  
15 Newbern.

16 THE COURT: Yes.

17 MR. NEWBERN: The objection basically asks for the  
18 Court to look at the role in which Eastern acted as a means of  
19 narrowing the activity before the Court making rulings on what  
20 happens if Eastern acts as a broker, what happens when Eastern  
21 acts for their own account, what happens when Eastern acts as a  
22 clearing agency.

23 I haven't done anything with that motion, Your Honor,  
24 because I got the feeling from the last hearing that the Court  
25 was going in a different direction.

1 THE COURT: All right.

2 MR. NEWBERN: I'm happy to refile it or, you know,  
3 ask the Court to address it. There have been no responses that  
4 I know of.

5 THE COURT: Well, that's what was brought to my  
6 attention that it's just kind of hanging there. I think I'll  
7 status that for February also and see if -- I mean, you may  
8 want to refine, or amend that or abandon it depending on the  
9 orders that are issued prior to February 13th.

10 MR. NEWBERN: All right. Very well, Your Honor.  
11 Thank you.

12 THE COURT: And then I believe also in Eastern in  
13 Friona I have a motion pursuant to Rule 56(d) to defer  
14 consideration or ruling upon the summary judgment motion until  
15 necessary discovery is completed. So, I do think we need to  
16 address that because that's one of the two orders that we're  
17 working on.

18 MS. GABBITAF: Yes, Your Honor, this is Darla  
19 Gabbitaf on behalf of Peoples Bank from Coldwater, Kansas. I  
20 believe that's our motion for summary judgment that we're  
21 discussing and I --

22 MR. TONER: I don't think -- this is Kevin Toner.  
23 I'm not sure that's right.

24 THE COURT: No, it's the --

25 MS. GABBITAS: Oh, my apologies then. My apologies.

1 THE COURT: It's the Friona. I think it's the  
2 trustee's motion that we're talking about, isn't it, Mr. Toner?

3 MR. TONER: Yes, I think it was about the response of  
4 the trustee's summary judgment motion.

5 THE COURT: Right.

6 MR. TONER: If you'd like the trustee to get the  
7 response I would be happy to do that. As you know, the motion  
8 presents (indiscernible) the matters of law, but we'd be happy  
9 to lay that out in short (indiscernible).

10 THE COURT: All right. I think Ms. Delcotto filed  
11 that. I don't know if she's on or not.

12 MS. DELCOTTO: Your Honor, I am on and I don't know  
13 how to address that today. I have begun to address with the  
14 trustee for instance and some of the discovery we're starting  
15 to see, clearly there are documents that are material to the  
16 statutory trust issue that perhaps the trustee did not know  
17 about before he filed his motion.

18 So, I'm just -- this is more confusion, ongoing  
19 confusion, on my part of the scope of some of these motions for  
20 partial summary judgment. I mean, I do think the Court, as we  
21 discussed last time, can rule on this issue of whether  
22 (indiscernible) is an absolute bar, regardless of any evidence  
23 at all.

24 But, when we start saying -- when we start going  
25 beyond that, then I guess I'm saying we're just now in the

1 midst of this discovery protocol and no discovery has really  
2 been done. And we're starting to actually see documents that  
3 are very relevant and I think for them questions of fact.

4 THE COURT: So is basically what you're saying -- I  
5 mean, I looked through this and it did look to me like when you  
6 start listing some of the issues of material fact -- first of  
7 all, I think what you just said is something that I stated last  
8 time and I agree with is that if you find that -- I mean, if I  
9 find that a constructive trust -- there can be no constructive  
10 trust then that ends the inquiry as a matter of law. If I find  
11 that a constructive trust can exist, it's fact sensitive and  
12 more discovery is needed. Is that what you're saying?

13 MS. DELCOTTO: Yes, Your Honor, and it's basically  
14 the same on a statutory trust.

15 THE COURT: All right. Now some of the things that  
16 you seem to raise though as to the status of Fifth Third, their  
17 actions in resulting the return to maker checks and all that, I  
18 mean it seemed to me like that's kind of outside the scope of  
19 this particular question.

20 I mean, it might go to a later claim that they're --  
21 they should be equitably subordinated or whatever, but it  
22 doesn't seem to -- it didn't seem to me at first glance that it  
23 was necessarily relevant to the pending motion.

24 MS. DELCOTTO: One of the -- we believe the trustee  
25 is saying two things. They're saying you can just never have

1 one period as a matter of law in bankruptcy.

2 THE COURT: Right.

3 MS. DELCOTTO: And they also say, well, there's  
4 another tool which says look at the effect and the unjust  
5 enrichment and look at some other things and by saying what  
6 Fifth Third knew and when they knew it is directly relevant to  
7 whether someone is going to be unjustly enriched.

8 MR. LATOUR: Your Honor --

9 THE COURT: Well, let me -- before we get into a long  
10 discussion of this, let me say this. I'm already far enough  
11 into this to say that if I rule that there can be a  
12 constructive trust, I understand that there's going to have to  
13 be further discovery on the particularized circumstances.

14 So, I think, you know, when I issue an order it's  
15 either going to say no that you can't have a constructive  
16 trust, or under these circumstances you can't have a  
17 constructive trust or we're going to have to have further  
18 proceedings to determine whether or not such a constructive  
19 trust could apply under these circumstances.

20 So, I don't know if that helps your anxiety or not,  
21 but I --

22 MS. DELCOTTO: I think you understand what I'm  
23 saying, Your Honor, and I'm willing to I guess take my chances  
24 on what these rulings are going to say for now. But, I just  
25 want to make sure you understand that there has been very



1 little discovery done in this case.

2 THE COURT: All right.

3 MR. TONER: Your Honor, this is Kevin Toner. I hate  
4 to leave the statutory trust comment just hanging because I  
5 just didn't comment on it a few seconds ago. The trustee's  
6 position is that because there are no pre-petition judgments,  
7 as a matter of law that doesn't happen.

8 Specifically on our summary judgment motion as far as  
9 the need for discovery, if these parties in the Friona case  
10 have evidence about the trustee's -- I'm sorry -- about  
11 Eastern's status, if they're in the possession of evidence,  
12 their clients know those transactions and none of them  
13 responded to this particular (indiscernible) responses to date,  
14 really comes back on the summary judgment motion as to that.

15 So that would be our written response to the points  
16 she's making in the motion you've raised just now. If you'd  
17 like us to lay that out in writing we'd be happy to.

18 THE COURT: I don't --

19 MS. DELCOTTO: Judge, I would just say you haven't  
20 really told us yet whether you're ruling on the statutory trust  
21 motion or whether that's just one that's going to sit there a  
22 little while longer.

23 I think some of the evidence that's beginning to come  
24 out in Fifth Third's possession specifically is (indiscernible)  
25 that talk about packers and stockyards and its implications.

1 And I don't want to get into a big argument, but there are  
2 clearly (indiscernible) that begin to talk about Packers and  
3 Stockyards Act.

4 I don't know whether the trustee had that before he  
5 filed to say it's a matter of summary judgment, but I disagree  
6 with that.

7 MR. LATOUR: Your Honor, this is Randall LaTour for  
8 Fifth Third.

9 First of all, the question of constructive trust or  
10 statutory trusts are issues that go to whether a particular  
11 fund is property of the bankruptcy estate or not.

12 What happens to that money after that determination  
13 is still going to be subject to a lot of debate, I'm quite  
14 sure. And I think your earlier point that a lot of the  
15 discussion really goes to that latter question and not to the  
16 additional question whether it's the property of the estate or  
17 not.

18 Whether the documents of Fifth Third's credit  
19 agreements have anything to say about packers and stockyards  
20 does not remotely change what the federal statute says. The  
21 federal statute makes clear that there is no statutory trust,  
22 and that's been fully briefed by everybody. So, there is no  
23 need for discovery on the statutory trust that comes from  
24 packers and stockyards.

25 MS. DELCOTTO: I disagree, Your Honor, but I don't

1 know that now is when we need to be arguing about this.

2 MR. LATOUR: Well, I certainly didn't expect the  
3 issue to arise. The agenda was to the contrary.

4 THE COURT: All right. Well, I've opened up the  
5 agenda somewhat, but I'm going to -- I'm just going to continue  
6 working on the motions that are in front of me. To the extent  
7 that that motion asks the Court to defer consideration, I'm  
8 going to deny the motion.

9 I do think -- you know, I will help expedite  
10 discovery with particularized motions and, you know, I'll  
11 consider a request to file anything in addition that any party  
12 puts forward.

13 I think we've just had recently a surreply in one of  
14 these matters. So, I'm not foreclosing other considerations,  
15 but I'm not going to defer consideration because as I said last  
16 time and I think the time before, I think it's time for the  
17 Court to start issuing some orders and that's my intent within  
18 the next few weeks.

19 MR. ROGERS: Your Honor, very briefly. This is John  
20 Rogers. If I could just briefly add one thing. There are of  
21 course a number of us who have framed arguments similar to the  
22 one raised by Ms. Delcotto today regarding the need for  
23 discovery and its bearing on the pending motion. I think she's  
24 kind of dealing with who filed the motion to defer  
25 consideration, but certainly what she has indicated brings a

1 relevance onto the discovery matter (indiscernible) posture.

2 THE COURT: Yes, I saw that there was -- some parties  
3 I think joined her motion.

4 All right. Anything else today?

5 MR. TONER: Your Honor, this is Kevin Toner again. I  
6 can report that on the Okie matter and the Cattlemen's  
7 transaction, \$3 million was declared last week and that has  
8 been wrapped up.

9 THE COURT: Yes, I was told that. That's good.

10 MR. TONER: Okay.

11 THE COURT: Anything else?

12 MS. BRYANT: Your Honor, this is Lisa Bryant again,  
13 and again I do apologize that I got here late. But, I don't  
14 know if Debbie Caruso brought this up earlier, but I'm hearing  
15 that Debbie wants to file a report of sale with regard to the  
16 Pfrimmers Road property and the other property that she  
17 auctioned.

18 And I did review her proposed report of sale and her  
19 tendered order of what my client (indiscernible) on the  
20 Pfrimmers property. And I have been authorized by my client to  
21 advise the Court that we have no legal basis to object. We  
22 hate that it's happening, but we have no legal basis to object  
23 to Debbie's report of sales and tendered order of  
24 (indiscernible) on the Pfrimmers property.

25 THE COURT: All right.

1 MS. CARUSO: Thank you. I appreciate that. I don't  
2 believe -- I haven't filed it yet, Lisa --

3 MS. BRYANT: I think (indiscernible) --

4 MS. CARUSO: He did?

5 MS. BRYANT: -- take a look at it and --

6 MS. CARUSO: Good.

7 MS. BRYANT: -- (indiscernible).

8 MS. CARUSO: And I appreciate that. Your Honor, we  
9 did complete an auction of some real estate in the Gibson case  
10 and received somewhere over \$200,000 from that sale, and now  
11 that is free and clear based on Ms. Bryant's representation on  
12 consent to the avoidance. So we'll be filing that, Lisa, and,  
13 Your Honor, sometime today or tomorrow.

14 THE COURT: All right. Very good. Thank you.  
15 Anything else from anyone? All right. We're adjourned.

16 THE ATTORNEYS: Thank you.

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C E R T I F I C A T I O N

I, JANET D. PERSONS, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter, and to the best of my ability.

/s/ Janet D. Persons

JANET D. PERSONS

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